Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution: Section 628(c)(5) of the	)	
Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORP.

Michael Olsen
Vice President - Legal Regulatory Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

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INTRODUCTION AND SUMMARY

Proponents of extending the exclusivity ban fail to meet the heavy burden established by law to justify such a result. The statute mandates expiration of the ban unless the Commission determines, based upon a thorough analysis of the marketplace today, that "such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." Such a determination requires empirical findings that lifting the ban would result in the withdrawal of specific cable-affiliated programming networks *and* that such withdrawal would harm consumer welfare.

No commenter has proffered the empirical evidence necessary to meet this standard. With strong and well-financed companies such as DIRECTV, EchoStar, Verizon, AT&T, and others offering hundreds of programming networks and a wealth of video content accessible via the Internet, no one can deny that competition has taken hold in the video programming

distribution market and the objective of the exclusivity ban has been met. The ban was expressly designed to be a temporary mechanism and must now be allowed to sunset.

Supporters of extending the ban improperly confuse harm to competitors with harm to competition. The demanding statutory standard for extension of the ban cannot be satisfied by unsupported allegations that cable programmers have "incentives" to favor their cable affiliates,[1/] that lifting the ban could "hamper" competition,[2/] or that a particular MVPD's competitive prospects "could be severely compromised."[3/]

Likewise, the ban cannot be extended based on unsupported claims that various cable-owned programming networks are "must-have" services that would be unavailable absent the ban. Such claims are devoid of any empirical evidence and do not satisfy the required showing that the withdrawal of any particular cable-owned programming service would harm competition in video programming distribution. Commenters' inconsistent and self-serving definitions of "must-have" programming further undermine their argument, which also ignores the Commission's own finding that withholding would "not make economic sense" for many cable-owned networks.

Finally, proponents of the ban disregard the level and strength of competition in today's video distribution marketplace, thereby distorting the analysis of the likelihood and impact of any program withdrawal that might occur as a result of lifting the ban. EchoStar argues that "the key threshold issues were resolved in 2002,"[4/] effectively urging the Commission to ignore the 50 percent growth in market share gained by cable's competitors since 2002, the entry into the

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1/ AT&T Comments at 3; DIRECTV Comments at 5.

2/ EchoStar Comments at 7.

3/ Qwest Comments at 5.

4/ EchoStar Comments at 2.

video market by Verizon and AT&T, and the explosion of video content available via the Internet.

As Cablevision demonstrated in its opening comments, the exclusivity ban is no longer necessary. Retaining it in today's marketplace would thwart creativity and innovation and inhibit competition and diversity in video programming distribution. The Commission should allow the ban to sunset.

I. PROPONENTS OF RETAINING THE BAN MISSTATE THE LEGAL STANDARD TO BE APPLIED IN THIS PROCEEDING

Proponents of reimposing the exclusivity ban seek to rewrite the statutory standard established by Congress. Rather than examine whether the ban is necessary to preserve and protect *competition* in the distribution of video programming, they complain that allowing the ban to expire would make it harder for *them* in the marketplace. Verizon, for instance, asserts that renewal of "its programming deals could be more difficult" if the exclusivity ban is lifted.[5/] In a similar vein, Qwest states that if the exclusivity ban sunsets "its ability to compete in the multichannel video market could be severely compromised."[6/]

Congress, however, did not intend the ban to remain in place for the convenience of particular competitors.[7/] The incumbent local exchange carriers' demands that cable operators remain subject to this compelled asset sharing requirement ring particularly hollow in light of

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5/ Verizon Comments at 7.

6/ Qwest Comments at 5.

7/ *See* 47 U.S.C. § 548(c)(5) (authorizing the Commission to reenact the ban only if "necessary to preserve and protect *competition*") (emphasis added); Applications of Pacific Telesis Group, Transferor and SBC Communications, Inc., Transferee, *Memorandum Opinion and Order*, 12 FCC Rcd. 2624, 2646-47 ¶ 48 (1997) (The Commission's "priority is to promote efficient competition, not to protect competitors") (*citing SBC v. FCC* and cases cited therein); *SBC Comm., Inc. et al. v. FCC et al.*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty . . . to subordinate the public interest to the interest of "equalizing competition among competitors").

their unequivocal condemnation of such requirements in their core voice telephony business.[8/] Notably, the ILECs argued that asset-sharing mandates were unnecessary because their residential voice competitors held 15 percent of the market. By contrast, non-cable MVPDs today serve almost twice that proportion of multichannel households. There is, if anything, greater justification to end the asset sharing obligations of cable operators.[9/]

Various commenters urge the Commission to examine whether cable has an "incentive" to use exclusivity to compete,[10/] but this claim misses the point. Such an incentive is common in the competitive marketplace,[11/] but the mere existence, if any, of an "incentive to withhold" is

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8/ *See, e.g.*, Petition for Writ of Certiorari of Verizon Communications in *Verizon Communications v. Trinko*, 540 U.S. 398 (2004) (No. 02-682), 2002 WL 32354607, at *15 ("Forced access reduced the incentives that antitrust law centrally encourages - to invest in rival facilities to lower cost and thus raise output. Incumbents will invest less if they must share, and new entrants will invest less where sharing is easier and less risky."); *id.*, Brief for Verizon Communications, 2003 WL 21244083 at *11 ("Forced sharing dampens incentives for incumbents who have to share the rewards of often risky investments, and for competitors whose independent investments in new facilities become riskier (and perhaps costlier) than sharing"); *Unbundled Access of Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Comments of Verizon, at 86 (filed Oct. 4, 2004) ("[I]ntermodal forms of competition offer consumers much greater benefits than forms of competition that merely duplicate the incumbent's offerings"); *Unbundled Access of Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Comments of SBC Communications, Inc. at 11 (Oct. 4, 2004) ("Where alternative providers are already competing successfully without forced UNE access, unbundling creates no competitive benefit, but rather merely inflicts on consumers and the economy the significant social costs that this Commission and the D.C. Circuit have rightly associated with forced sharing requirements").

9/ *See, e.g.*, News Release, Federal Communications Commission Releases Data on Local Telephone Competition, at 1 (Dec. 22, 2004).

10/ *See, e.g.*, DIRECTV Comments at 5; Verizon Comments at 7, 11; USTA Comments at 6. That such an inquiry cannot serve as a standard for decision is illustrated by RCN, which claims that both an increase in cable subscribership and a decrease in cable subscribership raises cable's "incentive" to withhold programming. *Compare* RCN Comments at 3 ("The incentive of incumbent operators to use their control over programming to stymie the development of competition has not changed since Congress enacted Section 628 -- if anything this incentive has increased . . . the larger the number of subscribers controlled by a provider, the larger the benefits of withholding programming from competitors, and the incumbents have steadily increased the number of subscribers they serve") and *id.* at 6 ("any erosion of their total number of subscribers provides additional, not less, incentive to act anti-competitively").

11/ Indeed, a firm's ability to differentiate itself in the market through exclusivity is generally regarded as an appropriate means of promoting investment, innovation, lower prices and enhanced consumer welfare. DIRECTV, in fact, characterizes offering "differentiated and exclusive content" as a

not enough under the statute to justify continued compelled sharing of programming.[12/] Congress did not authorize the Commission to reenact the exclusivity ban to blunt cable's "incentives" to use exclusivity to gain or retain market share, nor did it authorize an extension of the ban to protect any particular competitor. Rather, Congress established that the Commission's decision on whether to reimpose the ban should hinge solely upon whether it is indispensable to the preservation of competition in the video distribution marketplace as a whole. The Commission should reject alternative formulations of the applicable legal standard.[13/]

II. SUPPORTERS OF THE BAN HAVE FAILED TO PROFFER SUFFICIENT EVIDENCE TO SHOW THAT ITS RETENTION IS NECESSARY TO PRESERVE COMPETITION

The Commission has recognized that Section 628(c)(5) creates a presumption that the exclusivity ban should sunset and that therefore the ban's supporters bear the burden of demonstrating that its retention is necessary to preserve and protect competition in video programming distribution.[14/] Proponents of the ban must demonstrate with specific evidence that a sunset would result in the withdrawal of a significant quantum of cable programming from rival MVPDs *and* that this withdrawal would derail competition and harm consumer welfare. Not a single commenter supporting extension of the ban, however, mentions or references this

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top business strategy. The DIRECTV Group, Inc., SEC Form 10-K, at 5 (March 1, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-sec&control_selectgroup=Annual%20Filings.

12/ *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999) ("If Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included [any statutory standard] in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided").

13/ Adoption of AT&T's view that the *2002 Extension Order* properly focused on assisting DBS providers, and the instant proceeding should focus on aiding telco new entrants, *see* AT&T Comments at 9, would likewise result in a significant misapplication of the statutory standard.

evidentiary burden. To the contrary, some commenters seem to believe that the ban can be reimposed based on the Commission's assessment of the marketplace *five years ago*.[15/] Because supporters of the ban have failed to offer convincing empirical proof that either -- let alone both -- of these contingencies would occur following a sunset, they have failed to meet their burden to justify a further extension of the ban.

A. There Is No Evidence That A Sunset Would Result In The Withdrawal Of A Significant Volume Of Programming Available To Non-Cable MVPDs.

When Congress enacted the exclusivity ban, cable operators owned 57 percent of the programming networks available for distribution.[16/] Since then, that number has declined over 60 percent, with cable now in control of just over 20 percent of the programming networks available to MVPDs.[17/] A few proponents of the exclusivity ban suggest that cable can still be said to dominate the video programming marketplace, but those efforts are half-hearted at best. Qwest complains that 70 percent of the top 20 programming networks are owned by just 4 companies -- but two of those companies are not cable operators and those two own the lion's share of that top 20.[18/] Telco commenters argue that guaranteed access to cable programming was essential to facilitating their entry into the video market,[19/] even though, for example, less

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[14/] Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Sunset of Exclusive Contract Prohibition, *Report and Order*, 17 FCC Rcd. 12124, 12130-31 ¶ 16 (2002) ("*2002 Extension Order*").

[15/] *See, e.g.*, EchoStar Comments at 2 ("the key threshold issues were resolved in 2002 and need not be revisited").

[16/] H. Rep. No. 102-628, at 41 (1992).

[17/] *See* Cablevision Comments at 19.

[18/] Qwest Comments at 3. Of the 14 programming networks cited by Qwest, eight are controlled by Disney and Viacom.

[19/] *See, e.g.*, Verizon Comments at 3; AT&T Comments at 2-3.

than 20 percent of the more than 180 channels in Verizon's FiOS TV Premier package are owned by cable companies.[20/]

The actual facts refute any claim that cable operators hold sway over the programming market: 80 percent of the programming networks available to MVPDs lack any cable affiliation, cable's ownership of networks in the "top 20" or "top 40" has steadily declined in the past five years, the number of new programming networks created during that time has nearly doubled, and entry barriers into the video content supply market have crumbled -- as evidenced by the explosion of video offerings available via the Internet.[21/]

Unable to perpetuate the myth of cable control of the programming marketplace, supporters of the ban instead posit a category of "must-have" cable programming services.[22/] Most commenters make little, if any, effort to actually describe how and why a program network should be classified as "must-have," although RCN hazards a definition: "must have" programming is "programming that has no close substitutes and cannot be duplicated no matter how much time and money are committed."[23/] Under RCN's self-servingly narrow notion of substitutability, all "sports programming," "much kids programming" (such as PBS Kids), and any motion picture in a film library constitutes "must-have" programming.[24/]

While the comments reflect a substantial range of opinion regarding what programming networks are "must have," the category appears to encompass any cable-owned programming a

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20/ *See, e.g.*, Verizon FiOS Washington Metro Channel Lineup , http://www22.verizon.com/NROneRetail/NR/rdonlyres/7D3CAA14-02A3-4BCD-830C-6C3F630FBDD1/0/VA_WashingtonMetro.pdf (February 2007).

21/ *See generally* Cablevision Comments at Section III.

22/ *See, e.g.*, DIRECTV Comments at 6; Qwest Comments at 4-5; RCN Comments at 4; EchoStar Comments at 9; USTA Comments at 14; CA2C Comments at 9-10.

23/ RCN Comments at 4.

24/ *See id.*

distributor would like to carry. Proponents have made no effort to empirically demonstrate the existence of a category of "must have" programming by, for example, examining whether the cross-elasticities of demand for various video programming packages and offerings yield evidence of a core of "must-have" services. To the contrary, they offer little more than broadly divergent opinions about cable-owned programming networks they consider important. USTA lists, *inter alia*, E!, The Learning Channel and the Golf Channel, none of which are among the Top 20 most widely viewed networks.[25/] BSPA lists WE, the Travel Channel, Versus and Animal Planet, none of which are mentioned by any other commenter and each of which fall outside the top 20 most widely carried networks.[26/]

Asserting the existence of "must have" networks, however, is not the same as demonstrating that such networks exist. Nonetheless, EchoStar baldly claims that withdrawal of even a single "must have" network "could hamper, if not foreclose competition."[27/] With more than 500 programming networks available on the market (more than 80 percent of which are unaffiliated with cable), such an argument is unsustainable. Consumer demand for video programming is fragmented among hundreds of different networks and the vast array of content available over the Internet. There is no evidence to support the contention that the withdrawal of any single cable-affiliated programming network -- no matter how popular -- would harm competition and consumer welfare.[28/] Further, notwithstanding assertions by proponents of the ban that a broad swath of vertically integrated networks are "must have" programming, only

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25/ USTA Comments at 14.

26/ BSPA Comments at 6.

27/ EchoStar Comments at 7.

28/ *See* Cablevision Comments at Section III.

three cable-owned programming networks (none of which are owned by Cablevision) achieve an average prime-time rating above 1.0.[29/]

The Commission itself has acknowledged that not all cable-affiliated programming can be considered must-have, observing that "there clearly are services that either lack sufficient subscriber appeal to make them critical to the competitive success of DBS or for which reasonable substitutes are either available or could be created."[30/] Even assuming *arguendo* that some cable programming could be classified as "must have," proponents of the ban have made no attempt to empirically demonstrate that a withdrawal of a significant level of such programming would be the probable consequence of a sunset. While the Commission itself has stated that "in many instances, the economic incentive of vertically integrated programmers will be to make their programming available to as many MVPD outlets as possible,"[31/] proponents assume that cable will withhold its programming as soon as it is afforded the chance to do so.

No commenter in support of the ban attempts to explain why it would make economic sense for AMC or WE -- networks owned by Cablevision -- to forego the opportunity to obtain revenue from 32 million non-cable subscribers in order to capture monopoly rents from a cable system with a network footprint of only five million households, which faces competition in each of its markets from three larger and better-financed rivals. Similarly, no proponent of the ban attempts to make the business case for a decision by CNN -- a programming network that generates nearly half a billion dollars per year in advertising revenues[32/] -- to imperil that revenue stream (and forego substantial license fees as well) by repudiating more than one-third of its 90

29/ *See* Kagan Research, Economics of Basic Cable Networks 50 (2006) ("Kagan 2006 Cable Economics").

30/ *2002 Extension Order*, 17 FCC Rcd. at 12150 ¶ 57.

31/ *Id.* at 12i47-48 ¶ 53.

32/ *See* Kagan 2006 Cable Economics at 167.

million subscribers. In the absence of any empirical analysis, the Commission has no basis for finding that the ban continues to be necessary to preserve and protect competition.

B. There Is No Evidence That, In Today's Video Distribution Market, Cable Exclusivity Could Harm Competition.

Proponents of extending the exclusivity ban ask the Commission to believe that rival MVPDs' position in the marketplace is so fragile that the withdrawal of even a single cable-owned programming service would harm competition in video programming distribution. Such a view has no basis in fact. Whatever ability cable may have possessed to use exclusivity to harm competition in 1992 (when it served over 95 percent of MVPD subscribers and controlled 57 percent of all cable programming)[33/] is no longer present today, when more than one-third of all MVPD subscribers and four-fifths of all programming networks are controlled by non-cable companies. EchoStar purports to show that vertically-integrated cable operators have a heightened ability to foreclose competition through program withholding, but only by completely ignoring the existence and rapid growth of both DIRECTV and EchoStar[34/] and the impact of their status as the second and fourth largest MVPDs respectively on the viability of any attempt to use exclusivity to endanger competition.[35/] In any case, the putative "increase" in cable's foreclosure capability cited by EchoStar is attributable solely to a statistical anomaly, the timing of AT&T's spin-off of Liberty Media. Using either 2001 or 2003 as the starting date shows little or no change in the market share held by the major vertically-integrated cable companies.[36/] On

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33/ *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report*, 11 FCC Rcd. 2060, 2180-81 (1995) (Appendix G, Table 1); H. Rep. No. 102-628, at 41 (1992).

34/ *See* EchoStar Comments at 4-5, Table 1.

35/ *See* Cablevision Comments at 20.

36/ According to the *Seventh Annual Report* released at the end of 2001, the top vertically-integrated cable companies controlled 54 percent of MVPD subscribers. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report*, 16 FCC Rcd.

the other hand, during the 2002 - 2006 time period cited by EchoStar, non-cable providers increased their share of MVPD subscribers by 50 percent, and the Commission has implicitly acknowledged that the likelihood of successful foreclosure through exclusivity declines as non-cable MVPDs market share rises.[37/] Proponents of the ban simply ignore the significant increase in the "costs" of a foreclosure strategy that have occurred in the last five years.[38/]

Commenters supporting the ban also ignore the vast resources of DIRECTV, EchoStar, Verizon and AT&T and the sunk costs they have invested in their distribution platforms. It is irrational to assume that, confronted with the withdrawal of a handful of cable-owned programming services, each of these entities would simply exit the video distribution market.[39/] It is far more probable that these companies would respond to any cable exclusivity arrangements that might arise following a sunset in a manner similar to the responses shown in other segments of the content business where exclusive arrangements occur -- by entering into exclusive arrangements of their own, investing in new content, offering packaging and service

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6005, 6113 (2001) (Table C-3). Two years later, the *Ninth Annual Report* showed vertically-integrated cable companies in control of 49 percent of MVPD subscribers. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Ninth Annual Report*, 17 FCC Rcd. 26901, 26978 (2002). The market share figures of the four vertically integrated cable companies shown in EchoStar's Table 1 should be revised to reflect the increase in the total number of MVPD households (from the 92.1 million figure used in the *Adelphia Order* to the current 96.4 million figure) and Comcast's net loss of approximately 600,000 attributable subscribers arising from its recent Patriot Media and Insight Communications transaction announcements. *See* Mike Farrell, *Comcast Buys a Patriot*, Multichannel News, April 9, 2007, at 7; Mike Farrell, *Insight Facing Decisions*, Multichannel News, April 9, 2007, at 7; *Cable*, Communications Daily, April 3, 2007, at 8 ("the deal with Insight will make Comcast 639,000 customers smaller in the FCC's eyes."). With these revisions, the aggregate market share figure in EchoStar's Table 1 should be 54 percent, or unchanged since 2001.

37/ *See 2002 Extension Order*, 17 FCC Rcd. at 12140 ¶ 37 (noting that costs of foreclosure strategy "tend to be low when the initial loss in programming revenue is low (because, for example, the excluded platforms serve relatively fewer customers)").

38/ *See generally* Cablevision Comments at 15-18; *see also id.* at Appendix B, Dr. Scott Wallsten, The Effects of the FCC's Program Exclusivity Ban at 2, 12 ("Wallsten Report").

39/ *See* Cablevision Comments at 11-13, 15.

innovations, or utilizing any of a wide array of other countermeasures employed by companies in competition with one another -- all results that would promote consumer welfare.[40/]

Proponents raise particular concerns about the continued availability of regional sports networks ("RSNs"), but here, too, they offer no evidence that the availability of such programming is necessary to preserve and protect competition in video distribution.[41/] Referring to what it calls the "well-worn example" of lack of access to the RSN in Philadelphia, EchoStar claims that the unavailability of Comcast SportsNet has "inhibited" DBS' competitiveness there.[42/] EchoStar does not mention that DBS market share in Philadelphia has tripled since the issue of access to Comcast SportsNet was first raised, and that DBS penetration in Philadelphia is comparable to that in at least a half-dozen similar metropolitan markets where DBS providers have raised no issues regarding RSN access. Nor does EchoStar explain why, given its assertions concerning the importance of RSN programming, it declined to carry an RSN in Washington, D.C. (MASN) for two years, and still declines to carry one of the RSNs serving New York City (YES), even though YES is the most popular RSN in the country.[43/]

Several proponents of the ban believe that the economic analysis performed in the *Adelphia* transfer proceeding buttresses their view that RSN withholding by cable operators

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40/ Cablevision Comments at 8, 17; Wallsten Report at 4.

41/ RCN recycles polling data gathered for the 2002 sunset proceeding purporting to "show that some 40-58 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming." RCN Comments at 9-10 & n.27. Apart from the fact that they are at least five years old, these data are of little value since, due to the ready availability of sports programming in New York from a wide variety of outlets, there is virtually no chance that RCN's subscribers would ever "lack[] local sports programming." Further, RCN provides no information on the methodology of this survey and fails to explain what "less likely" means. Even on their face, the data show that up to 60 percent of subscribers may be completely indifferent about the availability of any local sports programming.

42/ EchoStar Comments at 9.

could harm competition.[44/] As demonstrated in the economic report submitted with Cablevision's comments, however, the "findings" regarding DBS penetration in Philadelphia are based upon a fatally flawed regression analysis[45/] that does not provide the empirical proof required to justify extending the ban.[46/] No proponent of the exclusivity ban has ever explained how DBS penetration in Philadelphia could be considered "low" due to the unavailability of the RSN there even though it is comparable to the penetration levels achieved in other similar markets where RSN access is not an issue.[47/]

Supporters of the ban have offered no empirical analysis or specific evidence showing that even if lifting the ban deprived them of access to some cable-owned programming, such withholding would result in harm to competition and consumer welfare.[48/] Accordingly, the ban must be allowed to sunset.

43/ *See* Cablevision Comments at 25-26. On April 6, 2007, EchoStar announced that it was launching MASN on its system, after declining to carry the service during the 2005 and 2006 baseball seasons.

44/ *See, e.g.*, EchoStar Comments at 9-10; AT&T Comments at 16. DIRECTV's suggestion that an analysis of the likelihood and impact of a "uniform price increase" strategy should be considered "interchangeable" with an analysis of the likelihood and impact of the withdrawal of a program service due to exclusivity is unavailing. *See* DIRECTV Comments at 9 & n.25. The costs associated with exclusivity are akin to the costs of permanent foreclosure, which the Commission has acknowledged to be higher than the costs of temporary withholding designed to effectuate a uniform price increase. *See* General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 511 ¶ 79 (2004). In any event, a sunset of the exclusivity ban would not increase the likelihood or incidence of uniform price increase strategies, since the restriction does not deter that conduct. *See id.* at 510 ¶ 77. Thus, the Commission's analysis of that issue in its *News Corp./DIRECTV* and *Adelphia* transfer proceedings has no bearing upon the issues implicated here.

45/ *See* Wallsten Report at 24-25.

46/ *See* Wallsten Report at 25 ("[T]he analysis does not specifically test the effect of RSN exclusivity. Instead, it tests whether DBS penetration in Philadelphia, San Diego and Charlotte are different than one would expect given the control variables and attributes those findings solely to RSNs").

47/ *See id.* (noting lack of controls that could help address the question of why "several major cities that do not have exclusive RSNs have lower DBS penetration than Philadelphia").

48/ Conversely, the Federal Trade Commission specifically examined the competitive impact of a withdrawal of RSN programming from competing MVPDs and found no evidence to indicate that "a loss

III. THE COMMISSION SHOULD DISREGARD ISSUES UNRELATED TO THE CORE QUESTION OF WHETHER TO EXTEND THE BAN

The Commission should disregard the extraneous issues raised by various commenters in this proceeding. RCN, for instance, resurrects a seven year old program access complaint that was dismissed by the Commission as somehow illustrative of "problems" with access to sports programming in New York, even though it currently has full access to all four regional sports networks distributed in the New York DMA. Verizon invokes a program access complaint it filed against Rainbow that was settled without Commission intervention. In a similar vein, Verizon complains that it has been unable to secure access to certain terrestrially-delivered HD offerings, but terrestrially-delivered content is not even subject to the program access law. These recitations have no relevance or probative value in the Commission's examination of whether to extend the exclusivity ban.

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of competition" would be likely. Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch, Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan. 31, 2006), at 2, *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoraskovacic_rosch.pdf.

CONCLUSION

For the reasons set forth here and in Cablevision's initial comments, section 628(c)'s ban on exclusive contracts should be allowed to sunset, or at a minimum, substantially restricted.

Respectfully submitted,

/s/

Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

Michael Olsen
Vice President - Legal Regulatory Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

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